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AMERICAN INDIANS AND THE RIGHT TO PRIVACY: A PSYCHOLEGAL INVESTIGATION OF THE UNAUTHORIZED PUBLICATION OF PORTRAITS OF AMERICAN INDIANS

*J. Wm. Moreland, Esq.**

*For years there has been a feeling that the law must afford some remedy for the unauthorized circulation of portraits of private persons.***

Introduction

The difficulties besetting American Indians who face the American judiciary are by now proverbial. Adding to these hardships are three disturbing cases—*Bitsie v. Walston*,¹ *Nelson v. Times*,² and *Benally v. Hundred Arrows Press*³—which hold that, as a matter of law, American Indians lack the ordinary sensibilities of reasonable people.

These cases all involve invasions of privacy accomplished by the unauthorized publication of the portraits of American Indians who were photographed at their reservation homes. The Indian plaintiffs brought suit in each of these cases, maintaining that their privacy had been violated, and, that they were particularly injured because their traditional cultural beliefs warned them against the evils to which one's portrait can be put if it is published without the subjects' knowledge. Because the courts involved have held that Indians, and American Indian traditional

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** Warren & Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193, 195 (1890).

1. 85 N.M. 655, 515 P.2d 659 (Ct. App.), cert. denied, 85 N.M. 639, 515 P.2d 643 (1973).

2. 373 A.2d 1221 (Me. 1977).

3. 614 F. Supp. 969 (D.N.M. 1985), rev'd on other grounds, 858 F.2d 618 (10th Cir. 1988).

beliefs, are not reasonably sensible, the courts have further held there is no legal reason to protect that aspect of their privacy infringed by photography, and no legal remedy available even if there was justification.⁴

These holdings are disturbing not only as a result of their considerable impact on Indian privacy, but also because they bode ill for the protection of every aspect of Indian cultural life. They have already adversely impacted wrongful autopsy cases,⁵ and this may be only the beginning. To the extent that American Indians may be foreclosed from vindicating their rights in court because a judge may label Indians as somewhat eccentric, pro tanto, all Americans similarly labeled eccentric will also be foreclosed from vindicating their own rights in court.

This article, therefore, will try to ascertain whether the courts have examined these three cases properly, whether the law affords some basis for relief to Indian plaintiffs whose privacy has been invaded, and whether therefore these holdings might be overruled on some basis. Proper analysis of this topic is considerably more complex than is suggested in the opinions of the three involved courts. In order to accomplish its goals, therefore, this article contains six sections.

The first section dissects each of the three Indian privacy portrait cases so that the reader can understand the issues of the cases, as well as understand how the justices in each case understood (that is to say misunderstood) those issues. The second section examines the psychological literature concerning the psychological nature of privacy. The third section provides a moral and philosophical rationale for protecting privacy as it is perceived by humans and not merely for protecting such economic interests as may appertain thereunto.

The fourth section discusses the law of the tort of invasion of privacy. This article is limited to privacy torts, not because the constitutional areas of privacy are thought to be less important, but because it is to these common law and statutory torts that persons must look for the protection of their personal lives from mass publication. Section four first discusses the Anglo-American law of privacy, then examines certain aspects of Indian civil law which, as a result of the tribes' inherent rights of sovereignty to legislate privacy ordinances, may have

4. *Bitsie*, 85 N.M. at 658-59, 515 P.2d at 662-63; *Nelson*, 373 A.2d at 1224; *Benally*, 614 F. Supp. at 982.

5. Letter from Stephen T. Lecuyer to J. Wm. Moreland (Mar. 26, 1986) (discussing the topic of the present article).

some unique bearing on the protection of the privacy of Indian citizens (i.e., protections are not open to non-Indian plaintiffs).

The fifth section applies the Anglo-American law of privacy to the facts of the cases dissected in section one, and demonstrates that the judges who tried these cases misapplied their own Anglo-American law of privacy. Finally, the sixth section draws some conclusions about the necessity for the law to provide protection to American Indians from the nonconsensual publication of their portraits.

The American Indian Portrait Cases

The three previously-mentioned cases which directly adjudicated this issue—*Bitsie*, *Nelson*, and *Benally*—all arrived at the same pernicious holding that American Indians are not reasonably sensible. A detailed discussion of each case seems a fruitful avenue for understanding how the courts involved viewed the issues.

Bitsie was heard in the District Court of Bernalillo County, New Mexico in 1973. Oscar Bitsie and his daughter, La Verne Bitsie, a three-and-a-half-year-old child at the time the cause of action arose, are members of the Navajo Tribe of Indians. The Bitsies sued James Walston (an artist), the United Cerebral Palsy Association, and the Journal Publishing Company of Albuquerque for invading La Verne's privacy by publishing one of Walton's sketches in the *Albuquerque Journal*.

The sketch, prepared from a photograph Walston had taken, was titled *La Verne Bitsie, Navajo Girl*. The portrait was used to illustrate an article, in the Journal Fine Arts section of a Sunday edition, about the Albuquerque Women's Committee of the United Cerebral Palsy Association. The Committee had manufactured some note cards which they were selling in an effort to raise funds for local programs to benefit children with cerebral palsy. The sketch of La Verne had been printed on one of the Committee's note cards. La Verne's case was based on her assertion that all of the activity surrounding her likeness was conducted without her consent.⁶

For quite some time, the *Albuquerque Journal* had published articles by specialists in Indian matters, detailing Navajo culture⁷ and examining how the Navajos' beliefs affected their daily lives.⁸ The *Journal* published these articles because they were of

6. *Bitsie*, 85 N.M. at 657, 515 P.2d at 661.

7. *Id.* at 659, 515 P.2d at 663.

8. *Id.* at 661, 515 P.2d at 665 (Sutin, J., dissenting).

interest to Indians and non-Indians alike.⁹ Also, the *Journal's* Sunday edition printed a Fine Arts section; it was this section that precipitated the legal action in this case.¹⁰

In 1970 James and La Verne Walston, the artist and his wife, had gone to the New Mexico State Fair. While at the fair, the Walstons toured the Indian Village on the Fairgrounds where they met Oscar and his daughter, La Verne; the three adults struck up a conversation.¹¹ The Walstons commented to Oscar on the coincidental naming of the two females. They also told him they thought his daughter was very cute, and asked if they could photograph little La Verne. Because James Walston failed to tell Oscar of the use to be made of the photograph, Oscar consented. Whereupon, La Verne Walston photographed La Verne Bitsie.¹²

The following February, James Walston used the photograph to prepare a sketch of La Verne. Walston mailed a copy of the sketch to Oscar, but again failed to disclose the ultimate use of the sketch.¹³

Later that year, the Walston sketch appeared in the Fine Arts section of the June 27th, Sunday edition of the *Albuquerque Journal*, with an article entitled, "Cards by Local Artists to Benefit Cerebral Palsy Fund." The article stated:

Note Cards designed by five local artists are being sold by the Women's Committee of United Cerebral Palsy to help finance a preschool for children afflicted with cerebral palsy. DESIGNS included are "La Verne Bitsie, Navajo Girl" by Jim Walston, printed on tan paper. THE CARDS are available at the United Cerebral Palsy office at 4807 Menaul NE. . . Later the cards are to be offered at the United Cerebral Palsy booth at the State Fair.¹⁴

Oscar was affronted by the article, because he felt it implied that his daughter was afflicted with cerebral palsy, which she was not, and additionally because the article associated his daughter with a serious ailment, and thus meant to him, and to other traditional Navajo Indians, that the child would be plagued with misfortune throughout her life.¹⁵ Further, Oscar was of-

9. *Id.*

10. *Id.*

11. *Id.* at 660, 515 P.2d at 664 (Sutin, J., dissenting).

12. *Id.*

13. *Id.*

14. *Id.*

15. *Id.*

fended because he had not consented to having the portrait publicized, and because his consent to the photograph of La Verne was gained only by his having been kept in the dark about its ultimate use.¹⁶

At the trial, in addition to Oscar's testimony of the article's adverse affects, tribal advocate Benjamin Begay testified there are more than 20,000 traditional Navajos in New Mexico who believe that if one's picture is linked with an impairment, one will be afflicted because harm has been wished on one.¹⁷ Additionally, La Verne's grandmother testified that she was concerned because, in so far as other fund raising campaigns involve children with serious health problems, it would be reasonable to believe that La Verne was a similar poster child afflicted with cerebral palsy.¹⁸

The Bitsies argued that the *Journal* knew or should have known that its article would be offensive, and that it knew that it should have asked permission to use La Verne's portrait. The Bitsies contended first that the *Journal* had run so many articles on Navajo culture that the newspaper could hardly help but know of the Navajo aversion to publication of portraits.

Support for the Bitsies' second contention was provided by a *Journal* editor, who testified that on two occasions the newspaper had obtained written consent to use photographs of children. These occasions were in connection with articles concerning retardation; the subjects were children who were patients in a hospital, and others who were students at a local school. The editor also maintained that when articles were written on topics which a staff member suspected to be offensive to any of the *Journal's* readership, the staff person was to tell the editor or managing editor so as to obtain an authoritative decision on whether to run the story. The problem in this case was that the newspaper had no policy covering articles on religious and cultural topics.¹⁹

Unmoved by all this, the trial court held against Bitsie. The Court of Appeals affirmed the trial court, saying:

A traditional belief . . . is a cultural feature preserved from the past We cannot, as a matter of law, equate an offense to persons holding such a belief with an offense to persons of ordinary sensibilities [T]he tort relates to the

16. Appellant's Brief at 8, *Bitsie*.

17. *Id.* at 11-12.

18. *Id.* at 9-10.

19. *Bitsie*, 85 N.M. at 660-61, 515 P.2d at 664-65 (Sutin, J., dissenting).

customs of New Mexico at this time [which is the developed society on which the interest in privacy is based] and does not extend to "traditional" beliefs.²⁰

In holding that Indians are not ordinarily sensible people, the court implied that the Bitsies believe in superstitious ideas, that they have been insufficiently socialized to the dominant culture, and that had they been so, the Bitsies would not have been affronted. The truth, however, is that, by virtue of his education and employment records, Oscar Bitsie appears to have been sufficiently socialized. Oscar, at that time, had been a Gallup-McKinley County School Systems attendance counselor for seven years. He held a B.A. in history, and he was earning an M.A. in guidance and counseling. Nevertheless, Oscar found the article offensive.²¹

The second case, *Nelson v. Times*²² was heard in the Superior Court in Penobscot County, Maine in 1977. Peter Anastas authored a book entitled *Glooskap's Children—Encounters with the Penobscot Indians of Maine*. In the book, Anastas used a picture of Robert Troy Nelson, taken at Robert's reservation home on Indian Island in Old Town, Maine. The portrait depicted Robert from the waist up, smiling, and standing before the Penobscot river. He was not identified in the newspaper.²³

Beacon Press published the book in 1973, and in February of that year, the *Maine Times* newspaper published a review of the book — a four-page spread that included a reproduction of Robert's portrait. Neither Robert nor any member of his family gave permission for the use of his portrait, nor was permission sought by anyone for its use. The Nelsons came to know of its use only because the *Maine Times* serves Old Town, and the Nelsons noticed the book review.²⁴

Robert brought action for invasion of privacy, contending that the use of his portrait was unconsented. Additionally, he argued its use exploited him and the Penobscot Indians for the pecuniary benefit of Anastas, Beacon Press, and the *Maine Times* newspaper.²⁵ In affirming the Superior Court's dismissal of the case, the Maine Supreme Judicial Court characterized the Penobscot Indians as being people not "possessed of ordinary

20. *Id.* at 658, 515 P.2d at 662.

21. *Id.* at 660, 515 P.2d at 664.

22. 373 A.2d 1221 (Me. 1977).

23. *Id.* at 1224.

24. *Id.* at 1222; Appellant's Brief at 2, *Nelson*.

25. Appellant's Brief at 10, *Nelson*.

feelings and intelligence," so that appropriation of the boy's likeness could not sound in tort.²⁶

The third and final case, *Benally v. Hundred Arrows Press*,²⁷ was heard in the United States District Court for the District of New Mexico, and was then appealed to the United States Court of Appeals for the Tenth Circuit. During the 1930's, renowned photographer Laura Gilpin traveled extensively throughout the New Mexico Navajo Indian reservation, accompanying a nurse to the tribe. The Navajos trusted her to the extent that she was allowed to photograph events few other non-Navajos were allowed to see.²⁸

In 1932, Lillie Benally, a Navajo woman, allowed Gilpin to photograph her, dressed in traditional regalia, and her young son, Norman, in a cradleboard. Gilpin titled the photograph, taken inside the Benally home, *Navajo Madonna*. In addition to exhibiting the portrait on thirty occasions, Gilpin published the silver print in five books and as a postcard. Despite the great trust Lillie had for the photographer, Gilpin used *Navajo Madonna* without receiving, or even without requesting, consent from either Lillie or Norman.²⁹ Unless Gilpin would have told them of her uses of their portrait, neither Lillie nor Norman had any means of discovering how their likenesses were being used. Their life on the reservation was remote and secluded, and they had little contact with off-reservation activities. They simply could not know that Gilpin was exploiting their photograph.³⁰

Gilpin died in 1979, bequeathing her photographs and personal papers to the Amon Carter Museum of Western Art. In 1980 and 1981, Hundred Arrows Press, Mediatex Communications, and Art Magazine Publishers requested copies of *Navajo Madonna* from the museum. As is its practice, the museum asked what uses were to be made of the prints. Upon receiving the requested information, the museum promptly sent each organization a copy of the portrait. Unlike the other defendants, Communication Specialists Inc. (CSI), did not obtain *Navajo Madonna* from the museum; like the others, however, CSI made

26. *Nelson*, 373 A.2d at 1224.

27. 614 F. Supp. 969 (D.N.M. 1985), *rev'd on other grounds*, 858 F.2d 618 (10th Cir. 1988).

28. Plaintiffs' First Amended Complaint, Exhibit D (Gilpin biography in defendant Art Magazine Publishers' *Southwest Art Magazine* at 71), *Benally*.

29. *Benally*, 614 F. Supp. at 971-72.

30. Plaintiff's Memorandum in Response to Motions to Dismiss and/or Summary Judgment of Defendants at 9, *Benally*.

no attempt to obtain permission for the use of the photograph from either Lillie or Norman. Again, Lillie and Norman had few other avenues of knowing that their likenesses were being exploited, or by whom, or how they were being exploited.³¹

And, indeed, each of the defendants were exploiting *Navajo Madonna* to their own ends. Amon Carter Museum was acting in its capacity as a supplier of art objects and information. Hundred Arrow Press, Mediatex, and Art Magazine Publishers published articles concerning Amon Carter Museum of Laura Gilpin, in which the Benally portrait was used as an illustration. CSI employed *Navajo Madonna* in a self-promotional full page advertisement in *Four Winds* magazine, published by Hundred Arrow Press. The same issue of *Four Winds* carried an article on Gilpin's photography.³²

Lillie's daughter-in-law, Sophie Benally, was shown by her physician the photograph reproduced in *Four Winds*. When Sophie told Lillie and Norman what she had seen, the two were chagrined—not only because, like other traditional Navajos, they believed that the unauthorized publication could bring them ill fortune,³³ but also because they had never consented to the publication of their portrait and had only agreed to sit for the photo with the understanding that it would not be published.³⁴

Additional arguments were offered which the court ignored in its opinion. While it was stated traditional Navajos believe that publication of their photographs can have adverse effects on them, it was also asserted that any reasonable person of ordinary sensibilities, whether Indian or non-Indian, would have been offended by publication of the person's portrait taken with the understanding that the photographer would not publish the portrait.³⁵ The district court, in granting summary judgment for the defendants, indicated that the Benallys had made no claim that the publication was offensive to an ordinarily sensible person, but only that it was offensive to traditional Navajos. This assertion by the court was, simply, incorrect, as shown by the Benallys' affidavits.³⁶ Quoting *Bitsie and Nelson*, the court

31. *Benally*, 614 F. Supp. at 971-72.

32. Plaintiffs' Memorandum in Response to Motions to Dismiss and/or Summary Judgment of Defendants at 1-29, *Benally*.

33. *Benally*, 614 F. Supp. at 971-72.

34. Declaration of Lillie Benally at 1-3.

35. Plaintiffs' Memorandum in Response to Motions to Dismiss and/or Summary Judgment of Defendants at 4, 14, *Benally*.

36. *Benally*, 614 F. Supp. at 982; Declaration of Lillie Benally; Declaration of Grant Benally; Declaration of Sophie Benally.

concluded that Navajos do not have the ordinary sensibilities of reasonable people, and that American Indians are not reasonably sensible people.³⁷

The courts involved in these three cases have indicated that privacy needs claimed by American Indians are distinguishable from privacy needs of other Americans in that the former are based on notions that are not reasonably sensible, and, therefore, cannot be protected. To test whether such an assertion is correct, it is necessary to first ascertain what privacy is—psychologically, morally, philosophically, and legally—and from what elements a right to privacy is devised from.

The Psychological Foundations of Privacy

It is important that the psychology of privacy be understood if human privacy is to be adequately protected by the law. As long as the law recognizes only the economic harms pertaining to invasions of privacy, and refuses to recognize the psychological harms accruing from invasions of privacy, the privacy of all American citizens is in jeopardy. This section, therefore, seeks to (1) explicate what privacy means to persons (and not merely what it means to the law), (2) what purposes privacy serves in society, and (3) what harms accrue from violations of privacy.

Diverse psychological investigations have been conducted on the many aspects of privacy. While the research has not been directly concerned with the topic of this article, much of it is nevertheless useful to this discussion. The research cited in this section deals either with privacy itself, or with a particular aspect of privacy: territoriality,³⁸ self-disclosure,³⁹ intimacy,⁴⁰ personal boundaries,⁴¹ self-expression,⁴² and self-clarification.⁴³

As one can see from this list, the psychological concept of privacy is extremely complex. To simplify this discussion, there-

37. *Benally*, 614 F. Supp. at 981-82.

38. See generally E. T. HALL, *THE HIDDEN DIMENSION* (1966); R. SOMMER, *PERSONAL SPACE* (1969).

39. See generally Ekman & Friesen, *Nonverbal Leakage and Clues to Deception*, 32 *PSYCHIATRY* 88 (1969).

40. See generally Morton, *Intimacy and Reciprocity of Exchange: A Comparison of Spouses and Strangers*, 36 *J. OF PERSONALITY AND SOC. PSYCHOLOGY* 72 (1978).

41. See generally I. ALTMAN, *THE ENVIRONMENT AND SOCIAL BEHAVIOR: PRIVACY, PERSONAL SPACE, TERRITORIALITY, CROWDING* (1975).

42. See generally D. PERLMAN & P. COZBY, *SOCIAL PSYCHOLOGY* (1983).

43. See generally S. DUVAL & R. WICKLUND, *A THEORY OF OBJECTIVE SELF-AWARENESS* (1972).

fore, the term *privacy* is used throughout, in lieu of the other terms except where they are necessary for clarification. Additionally, since the psychological concept of privacy is tied to psychological concepts of what one's self is, the term *self* requires explicit definition.⁴⁴ *Self* is used in this article to mean every aspect about an individual which the person considers to be an integral aspect of the person's status as a unique human being. This definition of *self*, as shall be seen, comports well with the definition of *self* used in the psychological research described in the following.

A particularly broad definition of privacy has been provided by social psychologist I. Altman:

Privacy is conceived of as an interpersonal boundary process by which a person or group regulates interaction with others. By altering the degree of openness of the self to others, a hypothetical personal boundary is more or less receptive to social interaction with others. Privacy is, therefore, a dynamic process involving selective control over a self-boundary, either by an individual or a group.⁴⁵

The boundary to which Altman refers is merely a hypothetical construct which symbolizes the notions of personal space and territory which are those aspects of the environment that individuals appropriate to their more or less exclusive use, as well as the notions of personality and personhood which are those aspects of individuals that make them each unique human beings. This definition of Altman's is, clearly, sufficiently broad to include not only personal information, but also personal behavior, and personal accoutrements and effects, including one's portrait. Altman's notion is that privacy, which he contends is a human need manifested in every society, is an evolutionary outgrowth derived from animal territoriality.⁴⁶ *Territoriality*, the tendency of individuals in some species to demarcate a particular portion of the environment as their space, has been observed in any number of animal species, and seems to be necessary for the well-being of those species and of their members.⁴⁷

There is some research which supports the contention of privacy being an outgrowth of territoriality. Wynne-Edwards has

44. Altman, *supra* note 41.

45. *Id.* at 6.

46. *Id.*

47. D. PERLMAN & P. COZBY, *supra* note 42.

shown that animals establish zones of privacy which serve to control the population of a species to avoid overtaxing the availability of local resources.⁴⁸ Hall has shown that these zones of privacy exist in the human species as well.⁴⁹ He found that people have zones of privacy which they make differentially available for interaction with individuals and with society.

Hall learned that people reserve for interacting with friends and family an encircling zone which includes their bodies and extends to four feet around them. The more intimate the friends or relatives, the closer they allow one another to penetrate this zone. For mere acquaintances and for formal situations, Hall discovered that people maintain a distance of between four and twenty-five feet.⁵⁰ Additionally, Hall found that the distances of these zones of privacy vary across cultures, with Americans maintaining greater distances between individuals than do people in Latin cultures.⁵¹ Moreover, in support of the assertion that privacy is a basic human need, Westin cites considerable anthropological research which demonstrates that all cultures have some concept of privacy, and that maintenance of privacy is necessary for the well-being of all societies and of their members.⁵²

Taken together, these findings make it clear that while differences in the manifestations of privacy needs are culturally determined, privacy needs are, nonetheless, inherent in human beings. Because this point is critical to the present discussion, a further development of this point follows.

Altman has shown that human responses to invasions of privacy are considerably more diverse than are the responses of animals. For example, while animal invasions usually result in aggression and violence, humans have developed complex social systems, such as laws and social norms, to control uninvited encroachments from others. Moreover, while animals tend to appropriate a few areas to themselves, areas suited to feeding and mating, people appropriate not only vastly different types of real estate, such as homes, work stations, and countries, but also less fixed types of property, such as a particular seat on a bus, or one's personal papers and effects. People also attach

48. Wynne-Edwards, *Self-Regulating Systems in Populations of Animals*, 147 *SCIENCE* 1543, 1543 (1965).

49. Hall, *supra* note 38.

50. *Id.*

51. *Id.*

52. See generally A. WESTIN, *PRIVACY AND FREEDOM* (1967).

considerations of privacy to their ideas, feelings, and emotions; such attachments would be difficult to demonstrate in animals.⁵³

Research has established that privacy is necessary for personal well-being in humans. In one study, Altman found that college dropouts were less effective in controlling their privacy than were students who continued their education.⁵⁴ In another study, he noted that societies more often survive and demonstrate effective functioning when they are able to regulate privacy than when they are not.⁵⁵ Fried concurred, showing that psychosomatic disorders and depression often accompany loss of privacy and loss of private space.⁵⁶

The research in group privacy indicates that privacy is not necessarily limited to an individual's retiring from society. Rather, privacy can include individual privacy, as well as matters which, while partially public, are restricted to a portion of the public, that is, matters of group privacy—a discussion of which follows.

Privacy then, can be viewed as a state of balance between matters kept to one's self, kept to a group, and presented to the general public. Patterson has put forth a hypothesis, composed of physiological arousal, emotional labeling, and approach and avoidance behaviors, to explain how this balance is maintained.⁵⁷ Patterson hypothesizes that human interaction always results in changes in the participants' physiological arousal, e.g., fluctuations in blood pressure, hormone levels, and body temperature. When an interaction occurs, according to Patterson, people look to the interaction to account for their level of physiological arousal. If the participants label the interaction as bad, such as having their privacy violated, they interpret their arousal as anger, shame, or the like. If the participants label the interaction as good, however, such as a pleasurable sharing of intimacies, they interpret their arousal as contentment, pride, or the like.⁵⁸

Patterson indicates that a number of variables influence a person's interpretation of an interaction. Among those variables

53. Altman, *supra* note 41.

54. Vinsel, Brown, Altman & Foss, *Privacy Regulation, Territoriality Displays, and Effectiveness of Individual Functioning*, 39 J. OF PERSONALITY & SOC. PSYCHOLOGY 1104, 1104 (1980).

55. Altman & Haythorn, *The Ecology of Isolated Groups*, 12 BEHAVIORAL SCI. 169, 169 (1967); Sundstrom & Altman, *Field Study of Cominance and Territorial Behavior*, 30 J. OF PERSONALITY & SOC. PSYCHOLOGY 115, 115 (1974).

56. Fried, *Grieving for a Lost Home*, in THE URBAN CONDITION (Duhl ed. 1963).

57. Patterson, *An Arousal Model of Intimacy*, 83 PSYCHOLOGICAL REV. 235 (1976).

58. *Id.*

are the degree of formality of the situation and the degree of familiarity between the participants. If formality is high and familiarity is low, for instance, people are more likely to interpret solicitations of personal matters as an invasion of privacy and they will more likely avoid the soliciting individual. If formality is low and familiarity is high, however, people are more likely to interpret such solicitations as desirable opportunities to share intimacies and they will more likely approach the soliciting individual.⁵⁹

If Patterson's formulation of privacy regulation is correct, people must be viewed as active regulators of their individual levels of privacy. Altman has suggested that when a person's efforts at privacy regulation are thwarted, feelings of isolation or feelings of crowding can result.⁶⁰ Unless the thwarting conditions are alleviated, psychological disorders and physical illnesses can result. This latter assertion is well documented.⁶¹

In contemporary society, a number of circumstances serve to frustrate privacy regulation. Newspapers and magazines, for example, are a constant threat to privacy, poised to publicize one's life in the name of self-defined newsworthiness.⁶² And, as another example, the mere size of the nation's population threatens to overwhelm any attempts to regulate one's privacy. That is to say, with the advent of national newspapers and magazines, the mere size of a nation's population, regardless of the population density in any given geographical area, is a constant threat to individual privacy regulation. Obviously, where population density is high, the threats to privacy regulation are concurrently increased.

Because it has been shown that privacy needs are manifested differently according to one's culture, that privacy is necessary for individual and social health, and that threats to privacy are always at hand, it seems clear that mechanisms must be developed to help individuals from divergent backgrounds maintain a balance between their own privacy needs and the other needs of a diverse society. This leads us to the discussion of how people decide what is private and what is public, and how they decide when they want to be private and when they want to be gregarious. Altman's concepts of self-boundaries⁶³ are useful, as

59. *Id.*

60. Altman, *supra* note 41.

61. See generally A. BAUM, & Y. EPSTEIN, *HUMAN RESPONSE TO CROWDING* (1978).

62. See *infra* notes 109-11 & 156-65 and accompanying text.

63. I. ALTMAN, *supra* note 41; Altman, *Privacy Regulation: Culturally Universal or Culturally Specific?*, 33(3) J. OF SOC. ISSUES 66 (1977).

shall be seen in the following discussion, in clarifying the inter-relationship between individuals and society in privacy management.

Self-boundaries are of two types—private or social—and have two conditions—open or closed.⁶⁴ Private boundaries can be further divided into one's personal boundary, or a group's interpersonal boundary. Those aspects of one's self which one wishes to conceal from everyone can be said to be behind a closed personal boundary. What one wishes to share only with a limited number of others can be said to be beyond an open personal boundary and within a set of overlapping open interpersonal boundaries (the individual interpersonal boundaries of each of the participants), but behind a closed social boundary. Thus, those aspects of one's self which one wishes to share within a limited community, either two individuals or some other limited group, are shared in the confidence that they will not be publicized further. Finally, those aspects of one's self which one will share with anyone else coincidentally present, such as a bus ride, or a soap box oration in the park, can be said to be beyond an open social boundary.

Personal control over these boundaries of privacy is believed to be essential for individual members of societies to maintain mental health and to be able to consider themselves unique human beings (i.e., to develop individuality). All cultures have evolved complex rules to allow personal control over privacy boundaries.⁶⁵ While it is the case that different cultures have evolved divergent types of rules, it is possible nevertheless to draw general conclusions about the goals and ramifications of the individual and socially approved rules for privacy regulation.

For example, while people typically relinquish their personal privacy in favor of interpersonal privacy as a result of the gradual development of some interpersonal relationship,⁶⁶ exceptions to this rule are not hard to imagine. People with similar recreational interests may find it easy to share many private experiences of mutual interest, even within the first minutes of meeting one another. For example, people interested in Olympic horse riding may freely discuss the minute and embarrassing

64. See generally Derlega & Chaikin, *Privacy and Self-Disclosure in Social Relationships*, 33(3) J. OF SOC. ISSUES 102 (1977); S. T. MARGULIS, *PRIVACY AS INFORMATION MANAGEMENT: A SOCIAL, PSYCHOLOGICAL AND ENVIRONMENTAL FRAMEWORK* (1979).

65. Altman, *supra* note 63; A. WESTIN, *supra* note 52.

66. See generally I. ALTMAN & D. A. TAYLOR, *SOCIAL PENETRATION: THE DEVELOPMENT OF INTERPERSONAL RELATIONSHIPS* (1973).

details of falling off their horses during competition. Those same individuals may not be so forthcoming with people who do not understand the rigors of their sport. Similarly, people with vastly different political opinions may find it impossible to discuss politics, even after having known each other for many years and having become quite good friends. Professional politicians, however, are much more likely to debate politics with their political opposites even though the two may be good friends. In both the general situations and in the exceptions to the rules, privacy regulation has served to maintain equanimity between people. The processes involved whereby people decide when and under what circumstances it is proper for one to relinquish one's personal privacy in favor of interpersonal privacy are explained by social penetration theory, promulgated by Altman and Taylor.⁶⁷ While this theory is primarily concerned with how interpersonal relationships develop, it seems applicable also to a discussion of why people relinquish their interpersonal privacy in favor of larger social interactions.

Adherents of social penetration theory notice that, in general, people tend to relinquish their privacy more easily in situations with which they are familiar than in situations about which they are unfamiliar. A number of factors contribute to this effect, including whether the situation is typically pleasant or aversive, whether other persons involved in the situation are open or reserved, and whether one feels comfortable in the situation or feels isolated or crowded. A final contributing factor is the person's idea of what future similar situations will hold, and whether such a future is likely to be enjoyable.⁶⁸

As people become more familiar with a situation, they relinquish their privacy in more areas, to a greater depth in each area, and for longer periods without becoming uncomfortable. An important aspect of this theory is that it indicates privacy is relinquished gradually, starting with areas of less intimacy and proceeding gradually into areas of increasing intimacy.⁶⁹ Individuals who are unable to control this process are at great risk of humiliation should the runaway process enter areas which they desire to keep private. Individuals are at much less risk when they closely monitor their relinquishment of privacy, to discover the outcome of their openness.

67. *Id.*

68. *Id.*

69. *Id.*

Another pitfall likely to be encountered if privacy regulation is uncontrolled is that vast amounts of deeply private material may be exchanged even though the interpersonal relationship remains quite superficial. Should people in this situation subsequently release material that the other parties find offensive, they would be at risk of the entire relationship dissolving and of having their private lives divulged to the world.

It should, by now, be clear that the privacy needs of any individual human being are in constant flux, changing from time to time and from situation to situation; changing, in short, as circumstances change. That one desires privacy now does not mean that one wishes to never again have human contact. As Altman has noted, privacy regulation is the regulation of the amount of human contact we want at any given time.⁷⁰ Moreover, as has been seen, personal privacy regulation is absolutely necessary to the health of people and their societies. Thus, while effective personal regulation of privacy is a difficult business, personal regulation of each individual's privacy must be allowed for by society if our nation is to reap the benefits accruing from privacy. The allowance must go as far as possible, short of liquidating other individual's rights.

Some of the benefits which accrue from satisfactory regulation of privacy are personal expression,⁷¹ social validation,⁷² and relationship development.⁷³ A particular detriment, on the other hand, which accrues from an individual's thwarted attempts at privacy regulation, is social manipulation.⁷⁴ In other words, people unable to satisfactorily regulate their privacy needs may be more easily manipulated than those more adept in this area.

While relationship development, one of the benefits of privacy, has already been discussed in connection with Altman, a few additional comments are in order. Privacy aids in the development and maintenance of intimate relationships. Partners in an intimate relationship disclose secrets to one another, share experiences, and provide one another with emotional support.⁷⁵ All of these positive outcomes are a result of the partners' confidence in each other that what they share in private will go unpublicized.

70. Altman, *supra* note 41.

71. S. DUVAL & R. WICKLUND, *supra* note 43.

72. Festinger, *A Theory of Social Comparison Processes*, 7 HUM. REL. 117 (1954).

73. Cf. Rubin, *Measurement of Romantic Love*, 16 J. OF PERSONALITY & SOC. PSYCHOLOGY 265 (1970).

74. D. PERLMAN & P. COZBY, *supra* note 42.

75. Rubin, *supra* note 73; S. DUVAL & R. WICKLUND, *supra* note 43.

Another benefit of privacy is that of social validation. Festinger has proposed that people examine society to discover the truth or falsity of their attitudes and beliefs, and the correctness of their behavior.⁷⁶ Among the most effective ways for people to evaluate themselves is to consult, privately, with their friends and advisors. Were these private consultations unavailable, many people would likely be too embarrassed to consult publicly and would, consequently, be forced to stumble through life, guessing about the correctness of their attitudes, behaviors, and beliefs.⁷⁷

A final benefit of privacy is that of improved personal expression. Duval and Wicklund suggest that ruminating on how others will view oneself increases self-awareness and makes for improved personal expression.⁷⁸ These authors maintain that a number of private activities, such as writing a letter or writing in a diary, or even rehearsing aloud what one is going to say later, increase self-awareness. With increased self-awareness, people tend to adjust their thinking; they tend to reduce ambiguities and inconsistencies in their thoughts, thereby avoiding self-criticism as well as the future criticism of others.⁷⁹ These authors further maintain that increased self-awareness cannot occur when an individual is actively participating in an interpersonal situation. Active participation is believed to remove the person's attention from the self and to shift it to the situation.⁸⁰ Only during a private moment, therefore, can this benefit be expected to develop.

Having discussed the benefits accruing from privacy, it seems obvious that society must give special consideration to this right. The loss of these benefits would surely change for the worse the social fabric of the nation. Moreover, privacy must be seen as a unitary concept. When any of the many aspects of privacy go unprotected, it is apparent that the underlying and unifying concept of privacy *qua* privacy is undermined so that all of the aspects of privacy become threatened. This must not be allowed to happen, because, the risks to our social fabric are too great.

The Moral Foundations of Privacy

This section examines the moral and philosophical reasons for protecting the privacy, not only of American Indians, but of all Americans as well. In deciding to protect privacy, a nation must ask (1) whose concepts of privacy can be protected, (2) why

76. Festinger, *supra* note 72.

77. *Id.*

78. S. DUVAL & R. WICKLUND, *supra* note 43.

79. *Id.*

80. *Id.*

these concepts of privacy should be protected, and (3) how those concepts of privacy can be protected. The answers to the first two questions are dealt with in this section. The answer to the third question is dealt with in the next section.

To summarize what was earlier discussed, an invasion of privacy is defined for our purposes here as another's unauthorized publicizing of any aspect of one's self which one wishes to keep private. To *publicize* is defined as to bring to public attention or scrutiny, or to subject to public interference; and the *public* is defined as anyone not privy to an aspect of one's private self. Thus, a person who apprehends one's private circumstance, but who engages in no further publicizing, nevertheless has invaded one's privacy; if further publicizing is conducted, privacy has been invaded. Obviously, not every invasion of privacy can be protected against. Protection, however, is a matter for the law, and it is moral responsibility with which this section is concerned.

Historically, Western philosophers have been silent on the moral foundation of a right to privacy, and most early discussions of privacy have come from the American legal field.⁸¹ A legal right to privacy first articulated as recently as 1890 by lawyers Warren and Brandeis in their seminal article, *The Right to Privacy*, which appears to have been an outgrowth of invasions by newspapers into Warren's private life.⁸² Because of the innumerable quotes from, and references to, the article, Breckenridge has called it "the most influential article published [on privacy as a right]"⁸³ Accordingly, Warren's and Brandeis's argument is summarized here.

Warren and Brandeis argued that the right which privacy protects, what they termed "the right to be let alone,"⁸⁴ had always been protected, at least to some extent, by the common law. The reason they put forth to explain the late recognition of this right was that, previously, invasions of one's private life had been difficult to implement, so that the few violations that did occur were remedied through existing law by recourse to legal fictions. However, with the technological advances existing even in 1890, invasions of people's private lives had become so

81. H. J. McCloskey, *Privacy and the Right to Privacy*, 55 *PHILOSOPHY* 37, 37 (1980).

82. J. BRECKENRIDGE, *THE RIGHT TO PRIVACY* 133-52 (1970).

83. *Id.* at 132.

84. Warren & Brandeis, *The Right to Privacy*, 4 *HARV. L. REV.* 193, 195 (1890) (quoting 2 COOLEY ON TORTS 29).

commonplace as to warrant the law's stepping in to provide explicit protection of privacy.⁸⁵

Warren and Brandeis observed—and later psychological research bore them out⁸⁶—that persistent invasion of privacy “destroys at once robustness of thought and delicacy of feeling. No enthusiasm can flourish, no generous impulse can survive under its blighting influence.”⁸⁷ After discussing a number of legal fictions under which privacy had already been afforded some limited protection, Warren and Brandeis asserted that the principle involved in the right of privacy is that of “inviolable personality,”⁸⁸ and the “general right to the immunity of the person, the right to one’s own personality.”⁸⁹ They asserted also that the protections of privacy “are rights as against the world,”⁹⁰ and called on the American legal community to take note.⁹¹

A considerable span of time elapsed, however, before the right which Warren and Brandeis had uncovered was generally recognized. Indeed, privacy remains a judicially disfavored remedy because it conflicts with first amendment guarantees of free speech and free press. Despite the judicial disapproval, tort actions in privacy are increasingly being brought concurrently with the increasing abilities of individuals and newsgathering organizations to violate other people’s privacy.⁹²

As a result of the increased interest in privacy, a number of people have attempted to ascertain whether privacy is a basic right which stands on its own, or a derivative right which serves to protect other, more basic rights.⁹³ As Caplan has pointed out, were privacy no more than “a derivative moral concept,” the need for its protection would be greatly decreased, and protection of the more basic rights would be most appropriate.⁹⁴

While some authors argue that privacy is a derivative right, others maintain it is a basic right. Caplan metaphorizes this debate as an “exciting ethical safari during which numerous

85. *Id.*

86. See *supra* notes 38-78 and accompanying text.

87. Warren & Brandeis, *supra* note 84, at 196.

88. *Id.* at 205.

89. *Id.* at 207.

90. *Id.* at 213.

91. *Id.* at 220.

92. See W. PROSSER & W. KEETON, ON TORTS: LAWYER’S ED. § 117 (5th ed. 1984).

93. See generally 55 *PHILOSOPHY* 315 (1980) (entire issue was dedicated to this question).

94. Caplan, *On Privacy and Confidentiality in Social Science Research*, in *ETHICAL ISSUES IN SOCIAL SCIENCE RESEARCH* 315, 315 (T.L. Beauchamp, R.A. Faden, R.J. Wallace, Jr. & L. Walters eds. 1981).

thorny cases will be slashed clear, many conceptual pitfalls avoided, and terrifying counter examples wrestled into logically consistent submission . . . result[ing] in undersized or worthless conceptual trophies."⁹⁵ As Caplan sees it, psychological, sociological, and anthropological data demonstrate well that privacy is a basic human need; *ergo*, privacy must be considered a basic human right.⁹⁶ This seems an altogether acceptable view, particularly in light of the considerable harms accruing from the loss of privacy.⁹⁷

If privacy is in fact a basic human need, then privacy is a basic human right. That is to say, if privacy is a basic human need, like food, water, and shelter, then one's privacy deserves protection, like one's food, water, and shelter. While it may be that people are not required to provide non-dependents with food, water, or shelter, it is only under limited circumstances that anyone can take others' food, water, or shelter away from them. Similarly, while it may be that people are not required to provide others with privacy, it should be only under limited circumstances that anyone can take others' privacy away from them. In other words, it should be only under limited circumstances that anyone's privacy can be invaded and violated with impunity.

Privacy's status as a basic moral right notwithstanding, its conflict with free speech and free press⁹⁸ remains. Conflicts of rights so basic to American society as privacy on the one hand and free speech and press on the other can be resolved only by recourse to moral value judgments. Before making such judgments, however, we should examine the process of making moral value judgments.

One of the greatest difficulties encountered when making moral judgments involving people from different cultures must surely be ethnocentricity, i.e., the belief that one's own culture is superior to others. If ethnocentric people sit in the position of decision maker, a nondiscriminatory decision is nearly impossible, particularly in situations of unequal power between the cultures. Where such a situation exists, close attention should be given to safeguards which will ensure that the weaker culture is not victimized outright by the dominant culture. In any event, if the members of the dominant culture have any wish at all to

95. *Id.* at 316.

96. *Id.* at 319-21, 325.

97. *Id.*

98. U.S. CONST. amend. I.

behave in an upright manner, it is no good for them to dismiss entirely the needs and expectations of the members of other cultures who will be affected by the majoritarian decisions.⁹⁹

Lamont, a civil libertarian and free speech and free press advocate, has written extensively on the elements of moral judgment, and his ideas are instructive to this discussion. As Lamont has pointed out, regardless of the ultimate source of morality, it is safe to say that the moral system of any human society is a result of social excogitation.¹⁰⁰ That is to say, regardless of wherever individuals receive their personal sense of right and wrong, the consensual morality of a society is the result of the application of reason and logic to the contemporary problems of the society. This is how the formal process of the common law works, and it is how the informal process of social morality works.

Such a conceptualization of morality should not be too difficult for anyone to accept. The English word *morality* comes from the Latin *moris* meaning custom, and *ethics* comes from the Greek *ethos*, also meaning custom. Thus, when we speak of a society's morals, we are speaking of its customs concerning correct behavior. As Lamont makes clear, this argument does not imply that moral standards of conduct are subjective. It does imply, however, that human understanding of these standards is imperfect and in constant flux. Just as we learn from the successes and failures of earlier moral systems, so too, future generations will learn from ours.¹⁰¹ To demonstrate that morality grows dated in the fullness of time, and that as technology changes society there is a concurrent change in morality, Lamont cites the automobile.¹⁰² While previously it mattered little where one drove one's cart, it is now morally incorrect to drive one's car on the wrong side of the road. Lamont also instances modern medicine in this context.¹⁰³

The advance of technology and the coming together of Indian and non-Indian cultures have interacted to create a complexity of moral questions, the satisfactory resolution of which can be had only through the type of flexible approach Lamont advocates. While it may be a grander practice to proclaim moral ideals, such a practice is doomed to failure,¹⁰⁴ in the present

99. See C. LAMONT, *THE PHILOSOPHY OF HUMANISM* 240-41 (6th ed. 1932).

100. *Id.* at 231-36.

101. *Id.* at 233.

102. *Id.* at 234.

103. *Id.* at 233.

104. *Id.* at 235.

context, and virtually assures increased hostility between the culture groups. Proclaiming the freedom of the American press to be superior to the privacy of the American Indians is no solution to the real dilemma.

Like the solution to all moral dilemmas, resolving the conflict of free press and privacy involves sorting out the correct interrelation of means and ends.¹⁰⁵ Lamont states that it is surely impossible that any end could justify any means. Nevertheless, it is equally true that particular ends can justify particular means.¹⁰⁶ This is not to make a utilitarian argument for moral judgment. Rather, it is to say that once society has come to some consensus as to which ends are desirable, it must then decide among the means available for achieving its goals.

Lamont argues that one cannot make a meaningful choice among means until all of the ramifications of the separate means are well understood, by engaging in, something like a cerebral environmental-impact or social-impact study. He asserts, therefore, that society cannot know whether a certain course of action is best until it has examined not only the effects of that course, but also the consequences of not following that course and the ramifications of following alternative courses.¹⁰⁷ Finally, Lamont argues that the means-ends dichotomy is false, that achieving one end is merely a means of achieving another end.¹⁰⁸

In the present discussion, there are two ends under consideration: privacy and free press. It should be recognized that while these are desirable ends in themselves, they are also means to the ends of a healthy society and a free society. The question to be answered, then, is not which of these basic rights should take pre-eminence, but under what circumstances and to what extent should each be afforded pre-eminence over the other.

Certainly, a free press is necessary for achieving and maintaining an open and honest government, and an open and free society. But are these ends sought only for their own sake, or as means to the citizenry's pursuit of happiness? Surely, the latter must be the case. If this is the case, then the press cannot be allowed to go trampling down all semblances of privacy, thereby obliterating any hope of true happiness, all in the name of facilitating the pursuit of happiness. Conversely, society cannot become so private that it becomes closed and repressive,

105. *Id.*

106. *Id.* at 236.

107. *Id.* at 237-38.

108. *Id.* at 238.

thereby also obliterating any hope of true happiness, all in the name of facilitating happiness. Society must strike a balance between these competing interests.

The common law's recognition of a need for balance was the origin of the newsworthiness doctrine.¹⁰⁹ Briefly, the newsworthiness doctrine states that if something is a legitimate news item, its communication by a news agency is privileged and a remedy for damages may not be had. The problem with the doctrine is that it essentially leaves the news agencies to decide what is newsworthy,¹¹⁰ a prime example of setting the fox to guard the hen house. Under this doctrine, unwilling people can be dragged before the public through no fault of their own, even if they have not accidentally put themselves in a locality of legitimate public interest.¹¹¹ News agencies, quite obviously, need more guidance.

Again we come to the question of means and ends. It seems clearly correct that an open and free society, governed by an open and honest government, is that society which would make its people the happiest; that a free press is the necessary means to these ends and that while presently we do not have these ends, if we continue with a free press we probably will someday. Free press professionals, however, appear to add something which is less clearly correct: if the trip to Utopia entails some people's privacy being violated along the way, that is to be deeply regretted. However, to use that as an excuse for encumbering the press would be to hinder or halt our approach to the desired ends, and that must not be allowed.¹¹² Lamont refers to this latter type of argument as future-worship,¹¹³ and he maintains it causes

the neglect of [individuals]'s present rights to happiness and their immediate opportunities for it. If human beings are to be happy and to enjoy life, it must always be during some period describable as *now*. What the future-worshippers do is to ask each succeeding generation to sacrifice itself in working exclusively on behalf of a distant Utopia that may or may not some day arrive. From the viewpoint of human

109. W. PROSSER & W. KEETON, *supra* note 92, at 853; see also *infra* notes 156-65 and accompanying text; see also *supra* text accompanying note 62.

110. See D. GILLMORE & J. BARRON, *MASS COMMUNICATION LAW* 331-46 (4th ed. 1984).

111. See *supra* note 1.

112. D. GILLMORE & J. BARRON, *supra* note 110, at 331-46.

113. C. LAMONT, *supra* note 99, at 239.

happiness and the sum total of good, today is just as significant as tomorrow and the current year just as significant as any a decade hence.¹¹⁴

It is to Lamont's "now" that this article is aimed.

If people are not to be mere means employed by the press to its own ends, regardless of how laudable those goals may be, and if human happiness is not to be completely sacrificed to the convenience of the press, then the press must be curtailed from publicizing that which is not public, and from making into public figures those who are merely private persons. Judge Sutin, in his dissenting opinion in *Bitsie*, made a proper case for such curtailment of press activities.¹¹⁵

Judge Sutin suggested that in the absence of authorization, private speech made public merely to increase the publicizers' income should not be protected, and should be actionable. This rule would include photographers attempting to sell or exhibit portraits for which authorization of the sale or exhibition had not been obtained from the subject, as well as newspapers and magazines attempting merely to increase their circulation and thus their income. Judge Sutin's rule would also include non-profit organizations selling the portraits for immediate financial gain or to enhance their status so as to increase their chances of securing monetary or other types of grants.

Judge Sutin's rule seems entirely justifiable on moral grounds. People should be prohibited from violating one's "inviolable personality" merely for their own gain. That is to say, people should be prohibited from using one's private life as a means to their pecuniary ends. Moreover, what is said in this article concerning the press is that much more applicable to those other invaders of privacy who are that much less constitutionally protected.

Finally, an argument can be made for the benefits which would accrue to journalism were journalists more prone to respect privacy. In the past decade or so, social scientists have devoted considerable energy to the issue of privacy of research subjects.¹¹⁶ The result of this soul searching has been the beginnings of the development of techniques and procedures that result not only in maintaining subjects' privacy, but also in

114. *Id.*

115. *Bitsie v. Walston*, 85 N.M. 655, 659-63, 515 P.2d 659, 663-67 (Sutin, J., dissenting).

116. See generally *ETHICAL ISSUES IN SOCIAL SCIENCE RESEARCH* (T.L. Beauchamp, R.A. Faden, R.J. Wallace, Jr. & L. Walters eds. 1981) [hereinafter *ETHICAL ISSUES*].

better science.¹¹⁷ Were journalists to devote some small fraction of their energies to this problem, similar advances are quite likely for their field. If the media are not willing to initiate this soul searching, however, the courts will need to help the press begin.

The Legal Foundations of Privacy

This section discusses the Anglo-American law of the tort of invasion of privacy, as well as certain aspects of Indian civil law which have some unique bearing of the protection of the privacy of Indian plaintiffs; i.e., protections not open to non-Indian plaintiffs. It is important to understand how the law has protected privacy in the past, if we are to understand how these protections must be implemented to protect privacy in the Indian portrait context. Moreover, it is important to understand what Indian tribes can do in the area of privacy protection, if we are to understand what they must do to protect the privacy of their members.

Anglo-American Law

Warren and Brandeis were the first authors to articulate the status of privacy as a right when, in 1890, they published their seminal article, *The Right to Privacy*.¹¹⁸ While the apocryphal and condescending remark has been made that Warren and Brandeis invented the right to privacy, the cases they cite demonstrate well that such a remark is, quite simply, wrong.

Warren and Brandeis cited a number of English cases, including the 1849 case *Prince Albert v. Strange*,¹¹⁹ which held that reproducing the Prince's etchings violated common law rules.¹²⁰ The authors quoted Lord Gottenham as relying on Lord Eldon's opinion in *Wyatt v. Wilson* to say, "privacy is the right invaded."¹²¹ In *Wyatt*, an 1820 case reported in a manuscript note,¹²² the court had prohibited the publication of an engraving of an ill George the Third.¹²³ Warren and Brandeis cited a

117. *Id.*; Caplan, *On Privacy and Confidentiality in Social Science Research*, in *ETHICAL ISSUES*, *supra* note 116, at 315; Boruch, *Methods for Resolving Privacy Problems in Social Research*, in *id.* at 292.

118. BRECKENRIDGE, *supra* note 82, at 132.

119. 1 McN. & G. 25 (1849).

120. Warren & Brandeis, *supra* note 84, at 202-04.

121. *Id.* at 205.

122. *Id.*

123. *Id.*

subsequent case, *Tuck & Sons v. Priester*,¹²⁴ to show that owners of a photograph have a right to have reproductions made of it without fearing that their contractors will make reproductions for themselves.¹²⁵ Finally, the authors cited an 1888 case, *Pollard v. Photographic Co.*,¹²⁶ in which the defendant, a portrait photographer, was prohibited, due to a breach of confidence, from displaying or marketing reproductions of the plaintiff's portrait.¹²⁷

Clearly, Warren and Brandeis did not in any sense "invent" the right to privacy. Moreover, they were correct when they said in 1890, "the existing law affords a principle, [that of inviolate personality,] which may be invoked to protect the privacy of the individual from invasion—by the too-enterprising photographer, or the possessor of any other modern device for recording or reproducing scenes"¹²⁸ They were further correct when they said that in applying the right to privacy, "the law has no new principle to formulate"¹²⁹

If Warren and Brandeis did not invent the right to privacy, what did they do? They developed a new theory to protect, not new interests, but new violations of old interests which previously had not often been violated, but which were being increasingly violated by more inventive means. Since the means of violating privacy have continued to become increasingly inventive, subsequent to Warren's and Brandeis' article, protecting privacy has become concurrently more important.

The subsequent development of this tort has been rocky, which in turn has made the development of a legal theory of privacy equally rocky.¹³⁰ In 1960, Prosser devised from case law an inadequate and inconvenient classification of "a complex of four" torts,¹³¹ which will be discussed later in this section. Prosser's classification is inadequate because it does not account for the subsequent development of constitutional protections of privacy,¹³² and because it fails to consider the underlying rationale of a right to privacy: that people have a right to keep their private lives private.

124. 19 Q.B.D. 639 (1887).

125. Warren and Brandeis, *supra* note 84, at 208.

126. 40 Ch. Div. 345 (1888).

127. Warren and Brandeis, *supra* note 84, at 208.

128. *Id.* at 206.

129. *Id.* at 213.

130. W. PROSSER & W. KEETON, *supra* note 92, at 851.

131. Prosser, *Privacy*, 48 CALIF. L. REV. 389 (1960); see *supra* text accompanying notes 135-70.

132. W. PROSSER & W. KEETON, *supra* note 92, at 851.

The classification is inconvenient because it does not account for the considerable overlap of the torts. For example, if a reporter-photographer were allowed onto a private estate to report on award-winning roses, but while there secretly covered a private gathering and subsequently published an article accompanied by embarrassing photographs, with a text that was truthful but embarrassing and so incomplete as to cast the participants in a false light, the journalist would have violated all four torts. Moreover, Prosser's classificatory scheme has led to doctrinal confusion. In the Indian privacy cases, for example, the courts have treated the four torts as one, thereby defeating the plaintiffs who had sought to establish evidence of distinct tortious conduct. While this confusion is not directly attributable to Prosser himself, nevertheless it is a direct outgrowth of his attempt to protect only the economic harms of invasions of privacy, rather than attempting to protect privacy itself.¹³³

Nevertheless, since the *Restatement (Second) of Torts* has accepted Prosser's four torts concerning the right to privacy,¹³⁴ they will be discussed. Prosser's four torts are as follows: "Defendant's appropriation of Plaintiff's name or likeness for Defendant's gain Defendant's intrusion into Plaintiff's solitude, seclusion, or private affairs Defendant's giving highly objectionable publicity to Plaintiff's private concerns Defendant's giving publicity to Plaintiff which casts Plaintiff in a false light" ¹³⁵

Before discussing Prosser's torts, however, it is worthwhile to discuss an absolute defense against them. Consent is said to be an absolute defense to any invasion of privacy.¹³⁶ Prosser's review of the cases, however, indicates that limited consent is only a defense if it is not exceeded. Where consent is exceeded, to that extent liability is incurred. In those states where privacy is protected by statute, the statutes require that consent be in writing. In those states where privacy is protected by the common law, consent must be reasonable to infer.¹³⁷ These are important questions for the Indian cases under discussion because the plaintiffs involved had consented to being photographed only, and not to having their photographs publicly

133. *Id.* § 117.

134. *Nelson v. Times*, 373 A.2d 1221, 1223 n.2 (Me. 1977); see *Introduction*, *RESTATEMENT (SECOND) OF TORTS* at VII, VIII (1977).

135. *RESTATEMENT (SECOND) OF TORTS* § 652 (1977).

136. W. PROSSER & W. KEETON, *supra* note 92, at § 117.

137. *Id.*

exposed.¹³⁸ Since this section is meant solely to illuminate the murky law of privacy applicable to these cases, further consideration of the role of consent in them is postponed awhile.¹³⁹ For now, each tort will be taken up separately.

*Defendant's Appropriation of Plaintiff's Name
or Likeness for Defendant's Gain*

The strength of Warren's and Brandeis' argument notwithstanding, their tort failed in its first test, *Robertson v. Rochester Folding Box Co.*¹⁴⁰ The defendants in *Robertson* had caused the plaintiff's portrait to be placed on its boxes, for which the plaintiff sued because she had not consented to such use of her portrait. The New York Court of Appeals, in a 4-3 split, failed to find a common law protection of privacy and indicated that such protection would need to be statutory. The vigor of the *Robertson* dissent, coupled with a public outpouring against the decision, created an atmosphere which convinced¹⁴¹ the New York Legislature to pass the needed statute the following year.¹⁴²

Three years later, the Georgia Supreme Court became the first court to recognize a common law right to privacy in *Pavesich v. New England Life Insurance Co.*¹⁴³ The defendants in *Pavesich* had placed a newspaper advertisement containing the plaintiff's photograph, without having gained the plaintiff's consent to use him in such a manner.

Prosser maintains that there are two elements to this tort: the plaintiff must be clearly identified, and the appropriation must be to the benefit of the defendant.¹⁴⁴ The benefit need not be monetary, except where stipulated by statute.¹⁴⁵ For the purposes of the identification element, names and likenesses are treated differently. With names, it must not appear that the defendant used a name which, coincidentally, was also the plaintiff's name. The defendant must be shown to have known the plaintiff's name and to have used it to misidentify the plaintiff in some manner.¹⁴⁶ This problem does not occur with a photographic

138. See *supra* text accompanying notes 6-37.

139. See *infra* text accompanying note 199.

140. 171 N.Y. 538, 64 N.E. 442 (1902).

141. W. PROSSER & W. KEETON, *supra* note 92, at 850-51.

142. 1903 N.Y. Laws ch. 132, §§ 1-2 (codified as amended at N.Y. CIV. RIGHTS LAW §§ 50-51 (McKinney 1976)).

143. 122 Ga. 190, 50 S.E. 68 (1905).

144. W. PROSSER & W. KEETON, *supra* note 92, at 853.

145. *Id.*

146. *Id.* at 852.

portrait, however, for obvious reasons. The second element is satisfied if the plaintiff can show that the portrait was employed to accomplish the defendant's purposes, other than the mere dissemination of information.¹⁴⁷ This provision exists to balance privacy with free speech and free press. Thus, for authors and publishers, the use of another's likeness must be for more than merely incidental use as an illustration of an article or book, even though the production of the article or book was for the pecuniary gain of the defendant. That is, there must be shown some deliberate attempt to capture the portrait's value,¹⁴⁸ and even then, it is probably necessary to show that there were other illustrations available which would have served as well. Two cases serve to illustrate these latter points.

In *Raible v. Newsweek*,¹⁴⁹ the plaintiff's picture was taken under the pretext that it would be used in an article about patriotic Americans. In fact, however, *Newsweek* magazine used the photo in an article about bigots. Even though the plaintiff had not objected to his being photographed, the case turned on whether he had agreed to the use to which the photograph was put. In 1977, the United States Supreme Court recognized this tort in *Zacchini v. Scripps-Howard Broadcasting Co.*,¹⁵⁰ in which the Court allowed recovery to the plaintiff for the defendant's having broadcast, in the evening news, Zacchini's entire human cannonball performance. *Zacchini* makes it clear that there is only limited constitutional protection for news agencies to appropriate one's likeness. As a result of the increased recognition of the misappropriation aspect of the invasion of privacy, most news agencies have developed standard consent forms to protect themselves.¹⁵¹

*Defendant's Intrusion into Plaintiff's Solitude,
Seclusion, or Private Affairs*

Unlike misappropriation, intrusion does not involve publication so it does not involve any constitutional protections at all. *Intrusion* is defined as follows:

One who intentionally intrudes, physically or otherwise, upon the solitude or seclusion of another or his private affairs or

147. *Id.* at 853-54.

148. *Id.* at 853.

149. 341 F. Supp. 804 (W.D. Pa. 1972).

150. 433 U.S. 562 (1977), *remanded*, 54 Ohio St. 2d 286, 376 N.E.2d 582, 8 Ohio St. 3d 265.

151. D. GILMORE & J. BARRON, *supra* note 110, at 366.

concerns, is subject to liability to the other for invasion of his privacy, if the intrusion would be highly offensive to a reasonable person [including:] surreptitious surveillance, [and] trespass, [or] where consent to enter [a] secluded setting has been exceeded.¹⁵²

A major intrusion case is *Dietemann v. Time, Inc.*,¹⁵³ which involved a couple of reporters who posed as patients to gather information substantiating the plaintiff's alleged medical quackery. The court held that such falsification of purpose made the defendants liable regardless of the nobility of their true purpose. In another case, *Galella v. Onassis*,¹⁵⁴ the defendant photographer doggedly pursued the plaintiff, to her distress. Onassis was allowed recovery and an injunction against Galella's further pursuing her because of the outrageous nature of his intrusion into her private sphere.

Prosser maintains that these cases turn on the manner in which privacy is invaded and the purpose for which it is invaded. "If the means used is abnormal in character for gaining access to private [concerns]," or the purpose is unwarranted, then otherwise allowable behavior becomes actionable.¹⁵⁵

Defendant's Giving Highly Objectionable Publicity to Plaintiff's Private Concerns

Warren and Brandeis wrote their article largely to bring about protection from publication of private facts which are not of legitimate public concern. Ironically, this type of case has become the most difficult to prosecute. In addition to other constitutional restrictions, "unreasonable publicity given to private facts" may be defended against by the doctrine of newsworthiness; that is, a matter of legitimate public interest. Judges seem to prefer application of the newsworthiness doctrine to all private-facts cases because it allows for first amendment freedoms, and because the court need not decide what is newsworthy.¹⁵⁶ The newsworthiness doctrine, however, is fraught with difficulties. It threatens to destroy all of the plaintiffs' rights, not only

152. RESTATEMENT (SECOND) OF TORTS § 652B (1977).

153. 284 F. Supp. 925 (C.D. Cal. 1968).

154. 533 F. Supp. 1076 (S.D.N.Y. 1982).

155. W. PROSSER & W. KEETON, *supra* note 92, at 856.

156. M. GILLMORE & J. BARRON, *supra* note 110, at 331-46; see also *supra* notes 109-11 and accompanying text, and *supra* text accompanying note 62.

in this area but also in every aspect of privacy,¹⁵⁷ and it has been applied inconsistently.

For example, in *Sidis v. F-R Publishing Corp.*,¹⁵⁸ the plaintiff had been a child prodigy in mathematics and received considerable public attention. Years later an article was published about him detailing his mundane life, including his attempts to stay out of the public eye. A remedy was denied the plaintiff because he was said to be still newsworthy. In *Virgil v. Sports Illustrated*,¹⁵⁹ however, a remedy was awarded in a case concerning an article which discussed the highly colorful life of a currently popular surfing star.

Originally, Prosser agreed that this tort was to protect private facts only.¹⁶⁰ Later, however, Prosser stated, "But merely because a face is one that occurred at a public place and in the view of the general public . . . does not mean that it should receive widespread publicity if it does not involve a matter of public concern."¹⁶¹ Moreover, relying on *Time, Inc. v. Hill*, and *Cox Broadcasting v. Cohn*, Prosser indicated that while the constitutional protections of the first and fourteenth amendments might cover publicizing matters of public record, they do not protect publicizing matters, whether private or public, which are not on any public record.¹⁶²

Cases involving disclosures of private facts are further complicated by notions of public and private persons. Some people seek notoriety, while others have it thrust upon them, if only to a limited degree. To the extent that one has come before the public eye, one has lost a degree of privacy. While public figures, even limited public figures, may receive pertinent publicity without liability being incurred, it is impermissible to drag purely private persons before the public and then claim they are public persons. It is this invasion of privacy which Warren and Brandeis sought particularly to protect.

Nevertheless, except in California,¹⁶³ the latitude afforded the press by the newsworthiness doctrine threatens to consume this tort. If this should happen, the worst fears of Warren and

157. See generally Kalvin, *Privacy in Tort Law - Were Warren and Brandeis Wrong?*, 31 L. & CONTEMP. PROBS. 326 (1966). See also *supra* notes 109-11 and accompanying text, and *supra* text accompanying note 62.

158. 113 F.2d 806 (2d Cir. 1940).

159. 424 F. Supp. 1286 (S.D. Cal. 1976).

160. W. PROSSER & W. KEETON, *supra* note 92, at 858-59.

161. *Id.* at 859.

162. *Id.* at 863.

163. See generally *Melvin v. Reid*, 112 Cal. App. 285, 297 P. 91 (1931).

Brandeis may yet be realized. In addition, because competing basic rights are involved, balancing those rights, as was done in *Virgil*, is by far more appropriate than applying a mechanical rule which does no more than cause judicial indolence. As the court said in *Virgil*, "Where competing values are involved . . . unless [the plaintiff] is to be sacrificed outright . . . [the press] must accept that risks are inherent and the problem lies in attempting to minimize them to the extent that the conflict permits."¹⁶⁴ Finally, it has been recommended that reporters eschew for themselves the intrusive techniques which they have so often criticized the government for employing.¹⁶⁵

*Defendant's Giving Publicity to Plaintiff
Which Casts Plaintiff in a False Light*

Prosser states that this tort is involved, inter alia, when one's portrait is used as a book or article illustration, falsely implying a connection between the writing and the plaintiff.¹⁶⁶ As it turns out, false light was the first privacy tort to come before the United States Supreme Court in *Time, Inc. v. Hill*.¹⁶⁷ The Court applied to this tort the actual malice standard of defamation from *New York Times Co. v. Sullivan*.¹⁶⁸ Subsequently, however, in *Gertz v. Robert Welch, Inc.*,¹⁶⁹ the Court drew a distinction between public and private citizens, and indicated that the states have some latitude in setting standards of liability for defamation of private citizens. While the states are not allowed to employ strict liability, they are not required to employ actual malice either. The Court has not extended this distinction to privacy cases, but there is every reason that given the proper facts, it should.

It has been speculated that the Court would be reluctant to extend the public-private distinction to privacy because it did not do so in *Cantrell v. Forest City Publishing Co.*¹⁷⁰ In *Cantrell*, however, journalistic outrages were so glaring, and actual malice so manifest, that the Court held not only were the reporters liable but also their publishers. The Court, therefore, had no opportunity to extend the public-private distinction to privacy. It seems entirely likely, consequently, that the Court would allow

164. *Virgil v. Sports Illustrated*, 424 F. Supp. 1286, 1286 (S.D. Cal. 1976).

165. D. GILLMORE & J. BARRON, *supra* note 110, at 362.

166. W. PROSSER & W. KEETON, *supra* note 92, at 864.

167. 385 U.S. 374 (1967).

168. 376 U.S. 254, *motion denied*, 376 U.S. 967 (1964).

169. 418 U.S. 323 (1974).

170. 419 U.S. 245 (1974).

an actual malice standard for public persons, but a negligence standard for private persons. This leads us to a discussion of the specific remedies available to American Indians by virtue of actions from the tribal governments.

American Indian Law

It is not entirely unlikely, in view of the ethnocentric opinions in the portrait cases under review, that Indian plaintiffs will be denied a favorable judgment when they bring an invasion of privacy before a state or federal court. In that eventuality, it might be necessary for the tribes to exercise their inherent rights of sovereignty to legislate privacy ordinances along the lines suggested in *Sullivan* and *Gertz*, and to render judgments against Indian and non-Indian defendants who violate the privacy of Indians on Indian lands. This measure would require, of course, that some tribes adopt as part of their code, inter alia, a provision allowing nonconsensual jurisdiction over non-Indians. It would also require, in some states, retrocession of civil jurisdiction to the tribes. The remainder of this discussion assumes those requirements to be met.¹⁷¹

Since the Indian Reorganization Act provided for the restoration of tribal governmental status and powers (e.g., the restoration to the tribes of their sovereignty in the use of their legislative and judicial powers¹⁷²), tribal rights to legislate privacy protection are apparently secure. This leaves the question of tribal judicial jurisdiction over various parties to render judgments entitled to full faith and credit.¹⁷³

While *Williams v. Lee*¹⁷⁴ established that exclusive jurisdiction is given to tribal courts in civil suits arising in Indian country and involving Indian defendants, jurisdiction over non-Indian defendants—that is, *Williams* in reverse—has not been decided. Nevertheless, such jurisdiction is probable. Tribal judicial sovereignty was established in *Iron Crow v. Oglala Sioux Tribe*.¹⁷⁵ Subsequently, in *Barta v. Oglala Sioux Tribe*,¹⁷⁶ the Eighth Circuit Court of Appeals recognized tribal powers to tax non-Indians on tribal lands. In *Washington v. Confederated Tribes*

171. See generally F. COHEN, HANDBOOK OF FEDERAL INDIAN LAW 145 (1982 ed.).

172. 25 U.S.C. § 476 (1970).

173. See, e.g., *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 65 n.21 (1978).

174. 358 U.S. 217 (1959).

175. 129 F. Supp. 15 (W.D.S.D. 1955), *aff'd*, 231 F.2d 89 (8th Cir. 1956).

176. 259 F.2d 553 (8th Cir. 1958).

of the Colville Indian Reservation,¹⁷⁷ the Court supported *Barta* by refusing to extend to the imposition of tribal sales taxes the *Oliphant v. Suquamish Indian Tribe*¹⁷⁸ exclusion of non-Indian criminal defendants from the jurisdiction of the tribes. Moreover, in *United States v. Mazurie*,¹⁷⁹ the Court recognized the tribes' inherent civil authority over non-Indians engaged in activities in Indian country which affect the health and welfare of the Indians. And, in *Montana v. United States*,¹⁸⁰ the Court extended this authority to all reservation lands. Finally, the rule in *Williams v. Lee* gives jurisdiction to the tribes on any matter threatening Indians' rights, and loss of privacy certainly threatens Indians' rights. If this analysis is correct, the tribal courts should have jurisdiction in all privacy invasions involving Indian plaintiffs except those involving defendants who are residents of another state and who remove the trial to federal district court.¹⁸¹

If defendants are residents of another state, actions could well be removed to federal court under the diversity provisions.¹⁸² Unfortunately, *Williams v. Lee* has placed considerable limitations on federal diversity claims involving Indian affairs because the federal courts, sitting as an alternative to the state courts, have had to apply state law.¹⁸³ The federal courts, therefore, serve as nothing more than surrogates for state interference in tribal affairs. Interference in tribal affairs, however, is prohibited by *Williams v. Lee*. Consequently, federal courts will hear only those diversity cases which could have been brought in state court had diversity not been involved.¹⁸⁴

This is too much! Even though diversity is based on state residence,¹⁸⁵ this difficulty is clearly anachronistic and should be of historical interest only. Applying state law in cases arising on Indian lands, as happened in *Benally*, violates the Tribal Self-Determination policy, it violates *Williams v. Lee*, and, if a federal district court refuses to hear a case, applying state law in cases arising on Indian lands leaves injuries without a forum in which to be heard. Therefore, it should stop.

177. 447 U.S. 134 (1980).

178. 435 U.S. 191 (1978).

179. 419 U.S. 544 (1975).

180. 450 U.S. 544 (1981).

181. 28 U.S.C. § 1446 (1988).

182. *Id.*; *id.* § 1332.

183. 28 U.S.C. § 1652 (1948); *Etie R.R. v. Tompkins*, 304 U.S. 64, 64 (1938).

184. *E.g.*, *Hot Oil Serv. v. Hall*, 366 F.2d 295 (9th Cir. 1966); *Littel v. Nakai*, 344 F.2d 486 (9th Cir. 1965), *cert. denied*, 382 U.S. 986 (1966).

185. U.S. CONST. art. III, § 2, cl. 1; 28 U.S.C. § 1332 (1988).

Federal courts should sit as alternatives to tribal courts when the cause of action arises on Indian lands. In other words, for purposes of diversity and choice of law, states should be interpreted to include Indian tribes. How else are Indians "to make their own laws and be governed by them,"¹⁸⁶ in cases involving diversity of citizenship? As *Benally* indicates, people are descending upon the reservations from all parts of the nation, disturbing the peace and violating the privacy of the Indian residents. If Indian plaintiffs can get no satisfaction from state law, does it matter who applies it? If Indian tribes are to be able to protect themselves and their members from invasions of privacy, and from a host of other ills as well, this diversity problem needs rethinking and reinterpreting.

A somewhat related issue is the weight to be accorded traditional Indian beliefs. The courts, in the portrait cases, have indicated that American Indian traditional beliefs have no place in American society or in American law, and, by implication, that American Indians have no place in America. This position is not new.

Any number of policies, in America, have attempted to suppress Indian cultures and traditional beliefs. Government agents have conspired with missionaries to convert and civilize Indians.¹⁸⁷ Whole tribes have been dispossessed of their sacred lands and of their traditional hunting and fishing grounds, to be compensated with far distant reservations¹⁸⁸ where missionary societies were granted large tracts of the reservations' lands,¹⁸⁹ and where Indian children were required to attend missionary schools at distances days from home.¹⁹⁰ As an aid to assimilation, the General Allotment Act of 1887 resulted in surrendering traditional communal ownership of land.¹⁹¹ And, as a final example, Indians have been punished for engaging in traditional ceremonies and other expressions of adherence to their traditional beliefs, and their medicine bundles have been forcibly burned.¹⁹²

186. *Williams v. Lee*, 358 U.S. 217, 219-20 (1959).

187. See generally F. PRUCHA, *AMERICAN INDIAN POLICY CRISIS* (1976).

188. Remarks of President Andrew Jackson, 3 *COMPILATION OF THE MESSAGES & PAPERS OF THE PRESIDENTS* 519 (J. D. Richardson ed.) (1904).

189. See, e.g., Treaty with the Chippewa of Saginaw, Swan Creek, and Black River, 1864, Oct. 18, 1864, United States-Chippewa, art. 4, in 2 KAPPLER, *LAWS AND TREATIES* 868, 872 (1904).

190. See generally C. E. SCHAEFFER, *AN ACCULTURATION STUDY OF THE INDIANS OF THE FLATHEAD RESERVATION IN WESTERN MONTANA, 1934-35* (1935).

191. 24 Stat. 388, 25 U.S.C. § 33L (1887).

192. T. MORGAN, *REPORT OF THE COMMISSIONER OF INDIAN AFFAIRS* 29 (1892).

While the judiciary has not been quite as malign toward Indian cultures and beliefs, neither has it been entirely benign. For example, it was said in *United States v. Sandoval*,¹⁹³ "Until the old customs and Indian practices are broken among this people we cannot hope for a great amount of progress. . . . The time must come when the Pueblos must give up these old pagan customs and become citizens in fact."¹⁹⁴ Here it can be seen that a vintage Court was not about to protect, or even tolerate, Indian beliefs.

In contrast to those earlier periods, later pronouncements on Indian beliefs have been more accepting. As Cohen commented, "Like the miner's canary, the Indian marks the shifts from fresh air to poison gas in our political atmosphere; and our treatment of Indians . . . reflects the rise and fall in our democratic faith."¹⁹⁵ In an act which reaffirmed the nation's faith in democracy, Congress in 1978 passed the American Indian Religious Freedom Act (AIRFA).¹⁹⁶ While the AIRFA may not be directly implicated in the Indian portrait cases, the intent of Congress expressed therein ought to be influential. The AIRFA expresses congressional acknowledgement that official and unofficial policies, by showing no tolerance for traditional Indian beliefs, have almost always done immeasurable harm to Indian peoples. Through the AIRFA, Congress has acknowledged further that it is obliged to extend its protection over Indian beliefs. By engaging in vituperative commentary against traditional Indian beliefs, current courts are eluding the will of the American people as expressed by Congress.

The Right to Privacy and the American Indian Portrait Cases

This section applies the law of privacy to the American Indian portrait cases under discussion. To analyze the legalities of these cases, Prosser's complex of four torts will be used.¹⁹⁷ This is not to show that Prosser's complex is so extraordinarily useful, but to show that even analyzing these cases under Prosser's framework, as the involved courts did, the courts in the Indian portrait cases committed plain error.

193. 231 U.S. 28 (1913).

194. *Id.* at 42.

195. Cohen, *The Erosion of Indian Rights, 1950-1953: A Case Study in Bureaucracy*, 62 YALE L.J. 348, 390 (1953).

196. Pub. L. No. 95-341, 92 Stat. 469, 42 U.S.C. § 1996 (1978).

197. See *supra* text accompanying notes 130-70.

One curious facet of the Indian portrait cases is that none of them were able to reach the jury. The adverse outcomes were all the result of the courts having found that plaintiffs were members of groups of people who are, as a matter of law, not reasonably sensible in their beliefs about the uses to which their portraits could be used. It was stated by these courts that the plaintiffs had no causes of action because their injuries resulted from their super-sensitivities and not from some real harm. This section is an attempt to determine if the courts' position is correct. Discussion of the role of reasonable sensibilities, in these cases, will be delayed until the end.

It seems clear that the likeness of each of the plaintiffs in these cases was wrongfully appropriated for the good of the defendants. At least the first element is obvious, i.e., the plaintiffs were all readily identifiable by their photographs. The next question is whether the use was incidental or was the result of a deliberate attempt to capture the value of the likeness. It is not at all clear how the use could be incidental. Incidental to what? The plaintiffs were alone, not in crowds where people may be fungible. Some of the plaintiffs may have been in the open, but so were Zacchini and Raible. In any event, can a person stand in the open without fear that photographers are all about, ready to snap one's picture, later to sell it and make a fortune, all without permission or even compensation? Prosser, *Zacchini*, and *Raible* say one can. After all, in what sort of goldfish bowl-nation do we make our homes? In what sort of a self-serving society do we make our friends?

Moreover, the plaintiffs were not notorious personages, nor did they accidentally put themselves in localities of notorious events. Rather, the photographers sought out and took pictures of those plaintiffs as individuals. Other individuals were available and could have been sought, but they were not selected. Deliberation then is clear, but what of value? Did the plaintiffs' likenesses have any value to be appropriated? If those likenesses did not, how did the photographers sell them? Since the plaintiffs' likenesses did have value, *Zacchini* makes it clear that the appropriation was not necessarily protected. As for the other defendants—the news agencies and nonprofit corporations—Judge Sutin's rule seems appropriate.¹⁹⁸ The nonprofit defendants were dealing in portraits for profit. The news agencies were doing the same. The plaintiffs were not newsworthy except to the extent that the news agencies made them so. That is,

198. See *supra* text accompanying note 115.

plaintiffs were private persons dragged before the public eye, but the defendant news agencies had no right to treat private human beings in that manner.

Nor would holding these cases to be invasions of privacy by appropriation of one's likeness place unreasonable constraints on the photographers' free speech. It cannot be contended that they merely ran over to the reservation to take a few snapshots. They went to a great deal of trouble to find just the right subjects. They went to a great deal of trouble to prepare the portraits. And they went to a great deal of trouble to market their work. A couple of the photographers even went to the trouble of asking the plaintiffs to sit for their portraits, but they did not go to the trouble of telling their subjects what was to be done with the photos. How much more trouble would it have been to obtain permission to publish those pictures? Furthermore, while they were going to all that trouble, what prevented the photographers from asking permission to publish? Did they not ask because they feared refusal? If that is so, the defendants acted with actual malice. In any event, by exceeding the limits of the granted permission, the photographers violated the plaintiffs' privacy.¹⁹⁹

In addition, *Cantrell* indicates that the photographers' employers, if any, could have been held responsible for the photographers' behavior. By similar reasoning, *Barber v. Time, Inc.*²⁰⁰ held that their transferees should be liable also. While *Dodd v. Pearson*²⁰¹ may appear to argue a contrary result, *Dodd* involved a public person and we have seen that the private-public distinction is available in privacy violations.

It seems equally clear that in these Indian portrait cases, the plaintiffs were subjected to unreasonable intrusions. Prosser indicated that intrusion cases should turn on the manner and purpose of the invasion.²⁰² The manner of the invasion was irregular in that it consisted of withholding from the plaintiffs the uses to which their portraits were to be put. Moreover, the purpose was to make money and not to report news. As was the case in appropriation, the news agencies and nonprofit corporations should be held liable for the acts of their agents.

Against the claim of objectionable publicity to private concerns, it was argued that the portraits were not highly objec-

199. See *supra* text accompanying note 139.

200. 348 Mo. 1199, 159 S.W.2d 291 (1942).

201. 279 F. Supp. 101 (D.D.C. 1968), *aff'd in part and rev'd in part*, 410 F.2d 701 (D.C. Cir.), *cert. denied*, 395 U.S. 947 (1969).

202. W. PROSSER & W. KEETON, *supra* note 92, at 856.

tionable. This defense misses the point. It is not the private events which are highly objectionable, but the publicity given to them. Most people do not find the private activities in their own bedrooms to be highly offensive, but if those activities were to be let out to the world, most people would likely be resentful. Similarly, the plaintiffs in these cases did not allege that their own faces were highly objectionable. They argued that all reasonable persons would have found highly objectionable the publication of their own portraits had they been photographed with the understanding that their portraits would not be publicized. It was the violation of human trust and confidence, involved in the publications, which the plaintiffs found to be highly objectionable. Moreover, because the plaintiffs were private persons, and their likenesses were not on public records, there would be no constitutional protection open to the defendants.

The false light invasion of privacy might not be so easy to comprehend for these cases, except *Benally*, of course. Nevertheless, all of these plaintiffs were cast in a false light before the public. The plaintiffs are members of groups of people who believe that it is dangerous to allow one's likeness to be scattered across the face of the earth. Insofar as only fools and lunatics engage in what they themselves perceive to be pointlessly dangerous behavior, *pro tanto* plaintiffs were falsely cast in the light of being fools and lunatics before the other Indian members of their communities. There was no compelling reason for the defendants to subject the plaintiffs to the ridicule and scorn of their communities. Nor can the defendants beg off as having had no intent to harm the plaintiffs. The plaintiffs were private persons; actual malice is unnecessary to recover in this tort. Only negligence is necessary.

So we see that far from the courts' contentions that these Indian plaintiffs had no causes of action, each plaintiff in fact had four causes against each defendant. In addition, resolving these causes of action turned on issues of fact. Therefore, all of these cases should have reached the juries. Examination of the opinions will show these cases were disallowed from going to the juries not because there were no causes of action, but solely because the judges were convinced that the charges were based on traditional Indian beliefs. That is to say, the justices misunderstood what they had been presented. They had been presented with real invasions of privacy which, coincidentally, involved traditional Indians. The beliefs of these plaintiffs had nothing to do with whether their privacy had been invaded. The beliefs had only to do with the question of damages. All of the

plaintiffs made similar arguments to the justices, but they argued to stone walls. The justices were so unreasonable apparently because of their convictions that the plaintiffs' beliefs demonstrated a lack of reasonable sensibilities.

A defense of the plaintiffs against such an absurd vitriol will not be undertaken, except to say this: Beliefs are unsubstantiated assumptions about the world. If they were substantiated, they would no longer be beliefs. From this perspective it appears that all beliefs, by their very nature, are unreasonable, be they Anglo-American beliefs or American Indian beliefs. Beliefs, therefore, are never more or less reasonable, only more or less acceptable, depending on the society in which they arise. America is a highly pluralistic society with room for any number of divergent beliefs, so long as they do not contravene the law. The beliefs involved in the Indian portrait cases did not contravene the law, i.e., the beliefs were not the origin of the claim of the invasion of privacy. The law has no new principle to formulate, consequently, when it extends the protection of privacy to the Indians.

The courts in these cases were correct when they said that it is to national and state norms that the protections of privacy extend. They were incorrect when they implied that Indians do not count. In what country do American Indians live? In what states do the Penobscot Indians of Maine, and the Navajo Indians of New Mexico reside? Indians are part of American society. The courts must recognize this fact and they must protect the rights of American Indians. Furthermore, the courts must cease from officially deriding American Indian cultural and traditional beliefs. The people of the United States of America have expressed their dissatisfaction with such derision and the courts must respect this attitude.²⁰³

Conclusions on Privacy and the American Indian Portrait Cases

We have seen ample social science evidence that the need for privacy is basic to Anglo-Americans and American Indians alike. We have seen that there is ample moral reason to protect Indians' rights to privacy, as well as ample legal doctrine to do so. What must still be questioned, on the other hand, is how the plaintiffs lost their portrait privacy cases.

Prosser argued that success in privacy cases often turns on whether the unwanted exposure is of matters which offend public

203. See *supra* text accompanying note 196.

mores.²⁰⁴ A perusal of the cases shows that Prosser was correct. That is, instead of protecting people from unwarranted and unreasonable invasions of their privacy, as Warren and Brandeis had advocated, the courts have frequently engaged in censoring stories which they have found to be offensive to public sensibilities. Privacy, however, is protection of individual sensibilities; protection of public sensibilities should be brought under charges of obscenity, pornography, and the like. The question in a privacy case is not whether a subject matter will entertain or offend the public. The question is whether someone's privacy has been invaded in a manner which, if it had happened to them, would have offended the general public. In many instances, that inquiry should encompass the subject matter publicized, but just as frequently, it should encompass the manner in which the plaintiff's privacy has been invaded.

The Indian privacy cases, *Bitsie*, *Nelson*, and *Benally*, were lost by the plaintiffs essentially on two findings: the pictures were flattering portraits of handsome people, and Indians were found not to be reasonably sensible. The first finding is irrelevant, the second absurd. Even if the findings in the Indian privacy cases weren't irrelevant and absurd, beautiful neurotics nonetheless have their rights. The plaintiffs were not beautiful neurotics, however, and they were not being unreasonable. They were merely attempting to protect their basic human needs, and thus their basic human rights to privacy.

The last point underscores the insidious nature of privacy violations. That is, if one's privacy is invaded and one attempts to assert a legal remedy, one has lost more of one's privacy. While it is certain that free speech and free press must remain free, these rights must not be allowed to annihilate privacy, thereby destroying the lives of people whose only recourse is to take it on the chin or further subject themselves to public scrutiny. To prevent this evil, it will be necessary for the law to protect privacy qua privacy and not merely to protect relevant economic interests.

Finally, it is clear that if the Anglo-American judiciary will not protect Indians' rights to privacy, the tribal judiciary will need to take up the task. Even if the Anglo-American courts do decide to protect privacy, however, the American Indian tribal courts should also—just to be sure.

204. W. PROSSER & W. KEETON, *supra* note 92, at § 117.

